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No. 96-1718

In The
Supreme Court of the United States
October Term, 1996

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, et al.,
Petitioners,

vs.

CITY OF SCOTTSDALE, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Nancie G. Marzulla
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St. NW
Washington, DC
20015-2405
(202) 686-4197

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26 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's holding in *Dolan v. City of Tigard* applies to permit exactions that are legislatively mandated?

2. Whether the *Dolan* "rough proportionality" test also applies to exactions of all forms of property or only to land?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....5

REASONS FOR GRANTING THE PETITION.....8

I. THERE IS ENORMOUS CONFUSION AMONG LOWER COURTS WHETHER THIS COURT'S HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO "LEGISLATIVE" EXACTIONS.....8

II. THIS CASE RAISES AN IMPORTANT CONSTITUTIONAL ISSUE REGARDING WHETHER THE HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO EXACTIONS OF MONEY.....15

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980).....8

Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281 (Minn. App. 1996).....10

Armstrong v. United States, 364 U.S. 40 (1960).....6

Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991).....15-16

Dolan v. City of Tigard, 512 U.S. 374 (1994).....passim

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996).....passim

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 8

Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994).....9-10

Home Builders Ass'n v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997).....3,13

Jacobs v. United States, 290 U.S. 13 (1933).....6

J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. App. 1994).....9

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).....6

Lynch v. United States, 292 U.S. 571 (1934).....6

National Ass'n of Home Builders. v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995)....16

TABLE OF AUTHORITIES-cont'd

Northern Ill. Home Builders v. County of Du Page, 649 N.E.2d 384 (Ill. 1995).....6,16

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 115 S. Ct. 2268 (1995).....7-8,10

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).....6,18

Schultz v. City of Grants Pass, 884 P.2d 569 (Or. App. 1994).....7,9

Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994).....16

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).....passim

CONSTITUTIONS AND STATUTES

Ariz. Rev. Stat. §§ 45-401 *et seq.* (1987 & Supp.).....2

Or. Rev. Stat. §§ 197.005 *et seq.* (1991).....11

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioner.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights and responsibilities.

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[1]No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

STATEMENT OF THE CASE

This case involves the imposition of a "water resources development fee" on all new development within the city of Scottsdale, Arizona. This fee has been imposed upon developers without any showing by the city of Scottsdale (Respondent) that the amount of the fee is necessary in any way to offset any public burden generated by the proposed development, or that the applicants for development permits will receive any benefit from projects to be funded by this fee.

The reason proffered by Respondent for the fee exaction is based on the Arizona Groundwater Management Act of 1980, Ariz. Rev. Stat. §§ 45-401 to 704 (1987 & Supp.), which requires municipalities to reduce their dependence on groundwater by achieving "safe yield" - a balance between the amount of underground water pumped out of the aquifers and the amount naturally and artificially recharged. Under this statute, the Respondent must demonstrate to the state Director of Water Resources by January 1, 1998 that it has sufficient water supplies to meet its developing needs for the next 100 years.

In order to comply with the Groundwater Management Act, the city undertook a detailed study of its water resources. This study concluded that Scottsdale lacks sufficient water for the future. *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 994 (Ariz. 1997). It also found that Scottsdale would need to raise capital to acquire new supplies of surface water and to construct a system to transport that water. Accordingly, the city began to take various steps to acquire properties needed to produce this additional water supply, including the purchase of Planet Ranch, which has surface water rights. *Id.*

However, without any showing whatsoever that new developments would cause a unique or undue burden on the city's water supply, but rather simply as a means of raising additional money, the plan also proposed to exact a development fee from new development applicants (both residential and commercial) in exchange for building approval. The city council adopted Ordinance No. 1940, imposing a fee of $1,000 per single family residence, $600 per apartment unit and $2,000 per acre foot of estimated water consumption for other new uses. *Id.* at 995. In short, the fees were exactions

unilaterally imposed as a condition on the approval of new developments.

Petitioner, Home Builders Association of Central Arizona (HBA), some of whose members paid the fee under protest, challenged this new exaction in a state court action filed in 1987. In 1991, the trial court held that the fee exaction was invalid under Arizona's Enabling Act because any benefit to the developers who were assessed the fee was too remote in time and speculative in nature to satisfy the proportionality requirement of the Enabling Act. The trial court also found, based on testimony at trial, that it is unlikely the new development upon which the fee is imposed will benefit, directly or indirectly from the projects funded by the fee because these projects, including the Planet Ranch, would likely never produce a water supply for the city of Scottsdale.

The Arizona Court of Appeals reversed this ruling and remanded to the trial court for a determination of the reasonable relationship between the fee and the impact of potential new development. Upon appeal of the Court of Appeals' remand order, the Arizona Supreme Court remanded the case back to the Court of Appeals for reconsideration in

light of this Court's opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Upon reconsideration, the Court of Appeals determined that *Dolan* did not apply to the present case, since the water resources development fee was legislatively enacted. The Arizona Supreme Court affirmed the opinion of the Court of Appeals on substantially the same grounds, but also held that this case could be distinguished from *Dolan* on the theory that development fees are a more "benign" form of regulation than the dedication requirement at issue in *Dolan*. *Home Builders Ass'n*, 930 P.2d at 1000.

SUMMARY OF ARGUMENT

This Court has held that permit exactions of private property must be "roughly proportional" to the burden placed upon the public by the development of that property. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The property owner in *Dolan* challenged the city's requirement for the dedication of a floodplain easement and land for a public bikepath in return for a permit to expand the landowner's plumbing supply store. This Court explained that the "rough proportionality" test requires that the government make an individualized

determination that the required condition is related both in nature and extent to the impact of the proposed development. *Id.* at 391. There was nothing in this Court's holding in Dolan indicating that the exaction rule applied only to property in the form of land.[2]

This Court has on numerous occasions held that other forms of property are entitled to the same degree of constitutional protection as that afforded to real property. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 44 (1960)(materialmen's liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596, 602 (1935)(real estate liens); and *Lynch v. United States*, 292 U.S. 571, 579 (1934) (insurance policies). In fact, this Court has held that money, specifically in the form of interest accruing on an interpleader fund deposited in the registry of a county court, was a property interest protected against uncompensated takings under the Fifth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *See also Jacobs v.*

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[2]Indeed, the reasoning of *Dolan* has been applied to situations involving development fees in several state court cases. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *Northern Ill. Home Builders v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995).

United States, 290 U.S. 13 (1933)(holding that just compensation for physical taking includes interest). This Court should accept review of this case in order to clarify the holding of *Dolan* regarding forms of property other than realty.

Review of this case is also important to clarify whether there is a constitutional distinction between exactions legislatively or adjudicatively imposed. Some state courts have refused to apply the *Dolan* test to exactions imposed by legislative action. *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). These courts have interpreted *Dolan* to mean that the rough proportionality analysis only applies to cases where the development fee is adjudicatively imposed through the permitting process, rather than generally applied through legislative action. Other state courts, however, have held that the origin of an exaction is not relevant to the analysis of whether *Dolan* applies, but have focused instead on the character of the exaction itself. *See Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. App. 1994). Indeed, the latter view was emphasized in the dissenting opinion of this Court's denial of *certiorari* in *Parking Association of Georgia, Inc. v.*

City of Atlanta, 115 S. Ct. 2268 (1995). The split of authority among the states calls out for a clarification from this Court on this issue. Accordingly, and because of the wide application and the millions of property owners all across America who daily face governments which demand private property in exchange for the ability to use their land, *amicus curiae* strongly urges this Court to grant the requested petition.

REASONS FOR GRANTING THE PETITION

I. THERE IS ENORMOUS CONFUSION AMONG LOWER COURTS WHETHER THIS COURT'S HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO "LEGISLATIVE" EXACTIONS.

In *Dolan v. City of Tigard*, 512 U.S. 374, 384-385 (1994), this Court distinguished prior cases (*Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)) that had upheld land use regulations as constitutional stating that:

> The sort of land use regulations discussed in the cases just cited, however, differ in two[3]

[3]The second distinction discussed by the *Dolan* Court -- whether the conditions were simply a limitation on the use of the property or instead

> relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

Id. The *Dolan* Court does not explain the constitutional significance of the adjudicative requirement for the Fifth Amendment to bar uncompensated adjudicatory exactions but not legislative exactions. Nor does it cite any case to further shed light on this inexplicable distinction mentioned but nowhere discussed in the opinion.

As a result, lower courts are understandably confused as how to interpret this apparently significant difference between the two types of exactions. *See, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. App. 1994) (rejected argument that legislative exactions not subject to *Nollan/Dolan* test); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. App. 1994)(holding that character of government regulation, not whether legislative or adjudicative, determines whether *Dolan* applies); *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994)(held that *Dolan* applies only to

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required an outright public dedication of property -- does not pertain to this discussion.

adjudicative acts); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. App. 1996)(held that *Dolan* not applicable to citywide legislative-land use regulation). This Court recently fanned the flames of this debate in the form of a dissenting opinion by Justice Thomas in the denial of *certiorari* in *Parking Association of Georgia, Inc. v. City of Atlanta*, 115 S. Ct. 2268 (1995). In that dissenting opinion Justice Thomas wrote:

> [i]t is hardly surprising that some courts have applied *Tigard's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . .The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 2268-69.

As Justice Thomas has suggested, not only does there not appear to be a sound basis for distinguishing for Fifth Amendment purposes between legislatively and adjudicatively required exactions, neither does there appear to be any practical difference between the two. In reality, many, if not most, exactions are "legislative" in nature if that term is

construed to mean that the exaction has some origin in the legislative process. Indeed, the floodplain and bicycle path dedications required of the landowner in *Dolan* originated in a legislative decision in the form of a city ordinance passed by the Tigard City Council mandating that developers dedicate land for these purposes. *Dolan v. City of Tigard*, 512 U.S. 374, 377-79 (1994).

Moreover, the challenged exaction in *Dolan* that was struck down as unconstitutional has a remarkably similar genesis as does the exaction at issue in this case. In *Dolan*, the state of Oregon enacted a comprehensive land use management program in 1973. Or. Rev. Stat. §§ 197. 005-197.860 (1991). The statute required all Oregon cities to adopt new comprehensive land use plans that were consistent with the statewide planning goals. Or. Rev. Stat. §§ 197.175 (1), 197.250. Pursuant to these state requirements, the city of Tigard developed a comprehensive plan and codified it in its Community Development Code. The exaction of Florence Dolan's property was due to application of this city land use plan. *Dolan*, 512 U.S. at 379-80.

In the instant case, the state of Arizona passed legislation in 1980 regulating municipalities' use of groundwater ("the Groundwater Code"). Ariz. Rev. Stat. §§ 45-401 to 704. Under the Groundwater Code, municipalities are required to assure that new development will have sufficient water supply to satisfy their needs for 100 years. Ariz. Rev. Stat. § 45-576(L). In order to satisfy the requirements of the Groundwater Code, Respondent formulated a "water resources plan" in 1985 that included the purchase of several potential new sources of water for the Respondent's future needs. In 1987, Respondent passed Ordinance No. 1940, which established the "water resources development fee" at issue in this case in order to fund these new sources of water. Property owners are required to pay this fee before they may obtain a development permit.

In both *Dolan* and the instant case, it is this "leveraging" of the permitting authority by the government that creates the danger of governments using its power to "extort" private property it wants for legitimate public objectives from individual landowners who are being forced to bear alone the cost of achieving that public good. The

nature of exactions and unequal bargaining power between the government and the individual singled out to bear that public burden is what creates the need for heightened scrutiny -- not whether or not the exaction flows from a legislative or adjudicative process.

Despite the lack of a sound basis in fact or theory, the distinction between legislative and adjudicative exactions has begun to grow roots. In affirming the decision of the Arizona Court of Appeals upholding Respondent's fee exaction on all new development, the court below held that the *Dolan* analysis was inapplicable "[b]ecause the Scottsdale case involves a generally applicable *legislative* decision by the city[.]" *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997)(emphasis in original).

As justification for its position, the court below cited the California Supreme Court's decision in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996). In *Ehrlich*, the landowner sought city approval to redevelop an economically unsuccessful private tennis club into a 30-unit condominium complex. *Id.* at 434. Despite the fact that the tennis club was a private, members-

only facility, the city was concerned that its conversion into a housing complex would leave city residents without adequate recreational facilities. *Id.* Accordingly, the city conditioned the granting of a development permit to construct the condominium complex on the payment of a fee for the replacement cost for the "lost" recreational facilities, as well as a fee to fund the city's "art in public places" program. *Id.* at 435. The California Supreme Court, on remand from this Court in light of the issuance of the opinion in *Dolan*, held by a plurality that the recreational impact fee did not satisfy the *Nollan* "essential nexus" and *Dolan* "rough proportionality" tests, but that the imposition a of fee exaction for the arts program did pass constitutional muster because the arts fee was more accurately characterized as a legislatively enactment of general application, since it applied to all development applications within the city. *Id.* at 450.

Thus, review by this Court is warranted on this critically important issue in Fifth Amendment jurisprudence in order to clarify whether there should be a distinction between exactions imposed legislatively or adjudicatively and if so, on what constitutional basis.

II. THIS CASE RAISES AN IMPORTANT CONSTITUTIONAL ISSUE REGARDING WHETHER THE HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO EXACTIONS OF MONEY.

The court below also upheld the constitutionality of the fee exaction on the ground that: "[h]ere, Scottsdale seeks to impose a fee, a considerably more benign form of regulation" than the dedication of land required of Mrs. Dolan. *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997)(*citing Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991)). In so holding, the court below failed to consider both the rationale of the *Dolan* holding as well as a significant line of cases that hold that development fees are subject to the *Dolan* rough proportionality analysis.

For example, in *Commercial Builders*, 941 F.2d at 872, decided before this Court's decision in *Dolan*, the United States Court of Appeals for the Ninth Circuit decided the question of whether Sacramento's imposition of an impact fee for non-residential development constituted a taking without just compensation. Although no unconstitutional taking was found as a result of the fee requirement, the Ninth Circuit applied both the *Nollan* essential nexus test and the reasonable

relationship test, later adopted by this Court as a model for the *Dolan* rough proportionality test, in considering whether the fee exaction violated the Just Compensation Clause. *Commercial Builders*, 941 P.2d at 876. The fact that the *Commercial Builders* court applied the reasonable relationship test to a situation involving impact fees negates the court below's conclusion that such fees are not subject to the heightened scrutiny required in *Dolan*.

Similarly, other courts have held that the *Dolan* analysis is applicable to fee exactions. *See, e.g., Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994)(holding that *Dolan* analysis applicable to fee in lieu of dedication), *Northern Ill. Home Builders v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995)(applying state version of *Dolan* analysis to impact fees), *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995)(holding *Dolan* applicable to requirement for cash proffer in return for permit approval).

Moreover, there is no reasonable distinction between impact fees and other forms of exactions. Although the court below characterizes the impact fee as a "more benign" form of

exaction than dedication of property, in either case a landowner is required to trade off something of value or existing rights in exchange for permission to develop his land. Whether the trade-off consists of money or real property is simply a distinction without a difference. In either case, the government has the landowner "over a barrel" with regard to the landowner's right to make beneficial and productive use of his property--a right guaranteed under the United States Constitution:

> In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right --here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)(citations omitted).

The California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied,* 117 S.

Ct. 299 (1996) has also rejected the notion of discriminating between various kinds of exactions:

> Under this view of the constitutional role of the consolidated "essential nexus" and "rough proportionality" tests, it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction.

Id. at 444.

Moreover, other decisions of this Court also reveal no difference between real property and other forms of property, including money. This Court has on numerous occasions held that personal property was entitled to protection against uncompensated takings. Both *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) demonstrate this Court's willingness to protect personal property. In *Ruckelshaus*, this Court adopted a definition of property that includes a wide range of business interests:

> [The] perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention'.

Ruckelshaus, 467 U.S. at 1003, *quoting* 2 William Blackstone, Commentaries *405. In *Ruckelshaus*, this Court held that Monsanto has a property interest in its business secrets that those business secrets and were protected by the Just Compensation Clause.

In the leading case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court was called upon to determine whether interest accruing on an interpleader fund deposited in the registry of a county was a property interest protected against uncompensated takings under the Fifth Amendment. This Court held that it was and in so doing set forth a definition of property that includes monetary interests and reflects the original conception of the reach of the Just Compensation Clause.

In the instant case, individual developers are being forced to pay a substantial fee in order to develop their property. At trial, the evidence indicated that the Respondent has made no particularized finding both generally about all new development and obviously specifically as to any single development proposed and its impact on the city's water supply. Pet. App. at 88. Rather, the fees are primarily

designed to assist Respondent in complying with the requirements of a state statute, the Groundwater Management Act of 1980, a law applying to the general use of municipal groundwater and itself not applicable specifically to new development.

Thus, developers, a small group of individuals dependant on the discretionary permitting power of the city, are being required to subsidize a citywide acquisition of new water resources at the threat of being denied the right to make beneficial and productive use of their properties. This is exactly the situation, municipalities using permitting power to exact constitutional rights from landowners, that this Court held unconstitutional in *Dolan*. Accordingly, *amicus curiae* strongly urges this Court to grant the requested petition for review or summarily reverse the decision below.

CONCLUSION

The area of takings jurisprudence continues to be a source of enormous confusion for lower courts. Hence, where there are discrete issues of constitutional concern that could be readily resolved through guidance by this Court, review is warranted. The instant case presents two such

issues for review. Therefore, and for all the above stated reasons, *amicus curiae* strongly urges this Court to grant the Petition for Writ of *certiorari.*

Respectfully submitted,

Nancie G. Marzulla
President and Chief
Legal Counsel
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, DC 20015
202-686-4197

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